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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1167 60

JAMES E. MARKHAM, Alien Property Custodian,
Petitioner,
vs.
ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW.

The opinion of the District Court (R. 29) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 50) is reported in 147 F. (2d) 136.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 24, 1945. The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the *Judicial Code*, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented is whether a federal district court can assume jurisdiction in an *in rem* proceeding to determine heirship and order distribution of the estate of a decedent where the estate is in the process of probate in a state court and where an *in rem* proceeding to determine heirship is pending in said estate in the state probate court.

STATUTES INVOLVED.

The statutes involved are Section 24 (1) of the Judicial Code as amended (28 U.S.C. 41 (1)) which provides that the District Courts have jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States or by an officer thereof * * *" and upon the Act of October 6, 1917, 40 Stat. 425, 50 U.S.C., Appendix, Section 17, which provides that the District Courts have jurisdiction to make such orders and decrees as are necessary and proper "to enforce the provisions of this Act".

STATEMENT OF THE CASE.

This is an action by the Alien Property Custodian against the executor of the will of Alvina Wagner, deceased, and against the defendants who are the American heirs at law of the decedent for adjudication of the rights and interests, if any, of the Alien Property Custodian.

The testatrix, a resident of San Francisco, California, died on June 6, 1942, leaving real and personal property in the State of California and her estate is now in the course of probate in the Superior Court of the State of California in and for the City and County of San Francisco.

Under the will of the testatrix the property was left to nationals of Germany residing in Germany on the date of her death. On December 31, 1942, the defendants filed a petition in the court in which probate proceedings were pending asking the court to determine heirship. On January 23, 1943, while this petition to determine heirship was pending in the state court, the Alien Property Custodian by Vesting Order 762, vested in himself for the use of the United States all the title of alien legatees and devisees.

The appellants claim the estate as heirs at law of the decedent upon the ground that under California Probate Code, Sections 259, 259.1 and 259.2 (see Appendix, page i), that the legatees and devisees named in the will are ineligible to take and that the estate should pass by the California laws of intestate succession.

REASONS FOR DENYING THE WRIT.

1. Federal jurisdiction is purely statutory and should be strictly confined to the statutory grant.

Indianapolis v. Chase National Bank, 314 U. S. 63;

McNally v. Jackson, 7 F. (2d) 373;

Cole v. Blankenship (CCA 4), 30 F. (2d) 211.

2. Jurisdiction is given by statute to the federal courts "of all suits of a civil nature, at common law or in equity brought by the United States or by any officer thereof * * *" (28 U.S.C., Section 41 (1).)

3. However, unless a proceeding is a "suit of a civil nature at common law or in equity" it is not within the jurisdiction of the District Court.

Southern Pacific Company v. McAdoo (CCA 9), 82 F. (2d) 121.

Thus the question of jurisdiction resolves itself into a question of the nature of the proceedings involved.

4. "The rule is that doubts are to be resolved in favor of the state court" as against the federal courts when jurisdiction is questioned.

Humphrey v. U. S. Fidelity and Guaranty Co., 38 F. Supp. 224.

In this case there was pending in the state court a petition to determine heirship when the Alien Property Custodian filed his vesting order and commenced this suit. The question before the state court was whether the American heirs or the German nationals were entitled to distribution of the estate of Alvina Wagner. Inasmuch as the Alien Property Custodian

can only seize such interest as the alien has he found it necessary after filing his vesting order to ask the federal court to decide the identical question that the state court had before it, namely, whether the American heirs or the German nations were entitled to the distribution of the estate. *Until such a determination was made the Alien Property Custodian couldn't be sure that he had vested anything.*

Now the California courts have in an unbroken line of cases held that proceedings to determine heirship are not suits "of a civil nature at common law or in equity" but are special proceedings in probate administration and are proceedings *in rem*.

Estate of O'Dea, 15 Cal. (2d) 637, 104 P. (2d) 368;
Estate of Olcese, 210 Cal. 262, 291 Pac. 193;
Murray v. Superior Court, 207 Cal. 381, 278 Pac. 1033;
Estate of Ross, 180 Cal. 643, 182 Pac. 755;
Estate of Raymond, 38 Cal. App. (2d) 305, 309, 100 Pac. (2d) 1085, 1086.

It would seem clear that if this proceeding is a probate proceeding *in rem* in the state court it is likewise a probate proceeding *in rem* when brought in the federal court.

5. A federal court cannot deprive a state court of its previously acquired jurisdiction of the *res*.

United States v. Bank of New York and Trust Company, 296 U. S. 463.

"The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where the property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshall assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property."

United States v. Bank of New York and Trust Co., supra, at page 477.

This suit is not merely a suit to establish a right *in personam;* the allegations and prayer of the complaint allege ownership and seek adjudication determining the *res* to be in the Alien Property Custodian. (R. 4-5.) The California Probate Court had already assumed jurisdiction (R. 3) and the effect of this suit was to oust the state court from its jurisdiction by obtaining an adjudication of heirship and a distribution of the estate to the plaintiff.

The controlling principle involved in cases of this character was clearly set forth by the Supreme Court of the United States in *Sutton v. English,* 246 U. S. 199 at 205, where the court stated the applicable rule as follows:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem,* matters

of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make will is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a State by statute or custom, gives to parties interested the right to bring an action or suit *inter partes*, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, *but that this relates only to independent suits*, and not to procedure merely incidental or ancillary to the probate; and further that questions relating to the interests of heirs, devisees or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy." (Emphasis added.)

The court then went on to examine the state statutes involved to determine whether or not an independent suit could be brought in the state courts and finding that it could not held that it could not be brought in the federal courts even though there was diversity of citizenship and the requisite amount was in controversy.

Thus the Supreme Court in effect says that in order to be "a suit at common law or in equity" in the fed-

eral courts the case must be one which the courts of the state would take cognizance of as "a suit at common law or in equity". And the test is clearly laid down to be whether an independent suit in the state court could have been brought.

It is abundantly shown by the authorities cited *supra*, page 5, that an independent suit could not be brought in the courts of California to determine this question but that the only place to adjudicate the matter is in the probate proceedings.

6. The fact that the federal courts lack jurisdiction in this instance does not deprive the plaintiff of full opportunity to adjudicate his claim.

(a) Upon the state courts, equally with the courts of the United States, rests the obligation to guard and enforce every right secured by the Constitution and the laws of the United States whenever those rights are involved in any suit or proceedings before them.

United States v. Bank of New York and Trust Co., supra, at 479;

Robb v. Connolly, 111 U. S. 624, 637.

(b) Here it is beyond question that the Alien Property Custodian is free to invoke the jurisdiction of the state court and, if its determination of the questions presented is not acceptable to him, to have that court's decision reviewed by the federal courts.

Judicial Code, Section 237, 28 U.S.C.A. 344;

United States v. Bank of New York and Trust Co., supra, at 479.

(c) There is ample provision in the California probate proceedings, in which the property of this estate was already in the course of administration at the time this suit was filed, for determining heirship and the right of the plaintiff to receive the distributive share of the alien residents of Germany.

Estate of Ross, 180 Cal. 643.

(d) Even had the District Court set up its jurisdiction prior to appropriate proceedings being under way in the state court, there is well established authority for its relinquishing its jurisdiction in favor of the natural, orderly and adequate procedure of the state court for the administration of the property of the estate.

Pennsylvania v. Williams, 294 U. S. 176, 185;
Gordon v. Ominsky, 294 U. S. 186, 188;
United States v. Bank of New York and Trust Co., supra, at 480.

(e) While the Trading with the Enemy Act (Act of October 6, 1917; 40 Stat. 425; U. S. Code, Title 50, Appendix, Sec. 17) confers a general jurisdiction to make and enter such orders and decrees as are necessary and proper "to enforce the provision of this Act", no authorities have been cited by plaintiff, nor do we find any such to exist, stating that this provision suspends or supersedes the recognized exclusive right of state courts to probate estates where their jurisdiction has been established, as was the case in this instance.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

Dated, Richmond, California,
May 21, 1945.

JOSEPH WAHRHAFTIG,
Attorney for Respondents.

S. C. MASTERSON,
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(Appendix Follows.)

California Probate Code, Sections 259, 259.1, 259.2.

259. *Right of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.